Office-Supreme Court, U.S.
FILED
MAR 11 1959
JAMES R. BROWNING, Clerk

No. 454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

SALVATORE TERRITO, CHARLES TERRITO, and VINCENT TERRITO
A Partnership, Trading as Territo & Sons
and
CALTER PETROLEUM CO., INC., A Corporation
Appellants

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM FINAL ORDER OF THREE JUDGE STATUTORY COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO RECALL JUDGMENT OF THE SUPREME COURT OF THE UNITED STATES AND TO REINSTATE APPEAL

FRANCIS J. ORTMAN
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Attorney for Appellants.

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The Appellants respectfully move the Court to set aside its *per curiam* decision of January 12, 1959, which dismissed the appeal in this case for the reason that the notice thereof was not filed within the time provided by law.

It is assumed that the *per curiam* decision of January 12, 1959, was based upon that portion of 28 U.S.C.A. 2101 (b) which provides that: "Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

It is now realized that the 60-day period within which the appeal should have been filed actually expired on August 5, 1958, or one day before August 6, 1958, the date on which the appeal was actually filed.

Appellants Suggest That Appeal Would Have Been Timely if Filed by August 10, 1958

The notice of appeal in this case was directed to the final judgment of the three-judge statutory court of the United States District Court for the District of New Jersey entered June 6, 1958. However, our attention has now been directed to the fact that the judgment entered by the Court on June 6, 1958, was opened by the Court for the purpose of entering a new and final order under date of June 11, 1958, which new order provided as follows:

> "Ordered, that that portion of the judgment entered on June 6, 1958, allowing costs be vacated and set aside."

A photostatic copy of the final order of June 11, 1958, in Civil Action No. 1134-57 in the United States District Court for the District of New Jersey, is attached hereto as Appendix A. Accordingly, it is respectfully submitted that the notice of appeal filed August 6, 1958, was well within the 60-day period provided for in 28 U.S.C.A. 2101 (b).

Notice of Judgment of June 6, 1958 Was Not Served Upon the Parties as Required by Rule 77 (d) of the Federal Rules of Civil Procedure

As an officer of this Court, the undersigned respectfully avers that the Clerk of the United States District Court for the District of New Jersey did not serve notice of the entry of the judgment of June 6, 1958, nor of the final order of June 11, 1958, in Civil Action No. 1134-57 upon the parties affected thereby as required by Rule 77 (d) of the Federal Rules of Civil Procedure. The fact is that the undersigned attorney was first informed of the entry of the June 6, 1958, judgment on June 23, 1958. After making inquiry of the Assistant General Counsel of the Interstate Commerce Commission, the undersigned attorney was informed that the Interstate Commerce Commission did not receive notice of the entry of the judgment of June 6, 1958, until June 19, 1958. These facts are further substantiated by Appendix B attached hereto, which is a photostatic copy of the entry by the Clerk of the Lower Court concerning Defendant's costs. It will be noted that this document was served only upon the U. S. Attorney and Peter J. Cammarano, Esq., who was New Jersey counsel for the Appellants. A copy of such entry was admittedly not served upon the Interstate Commerce Commission nor upon the undersigned attorney who was a party of record in the case before the three-judge statutory court of the United States District Court for the District of New Jersey.

No objection was made as to the filing of the notice of appeal by either the United States of America nor by the Interstate Commerce Commission. The jurisdictional statement was received by the Supreme Court of the United States together with the Government's Motion to Affirm and the Brief of Appellants in Opposition to Motion to Affirm. Insofar as the Appellants have been able to ascertain, the Government does not object to having the appeal considered as

having been timely filed. It is, therefore, requested that the Court grant this Motion in accordance with the apparent discretionary powers vested in the Court under the provisions of Rules 77 (d) and 73 (a) of the Federal Rules of Civil Procedure.

CONCLUSION

In view of the circumstances referred to herein, it is respectfully requested that the Court recall its judgment entered herein on January 12, 1959, and reinstate the appeal from the final order of the three-judge statutory court of the United States District Court for the District of New Jersey.

The ultimate disposition of this case is of primary importance to the Appellants. The fact is that no apparent jurisdictional determination has ever been made on the question as to whether the Interstate Commerce Commission may institute an investigation of private carriers under Section 204(c) of the Interstate Commerce Act when such investigation pertains to matters other than the qualifications and maximum hours of service of employees, and standards of equipment.

Respectfully submitted,

FRANCIS J. ORTMAN
1366 National Press Building
Washington 4, D. C.
Attorney for Appellants.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL #1134-57
ORDER

SALVATORE TERRITO, CHARLES TERRITO and VINCENT TERRITO, a partnership, trading as Territo & Sons and CALTER PETROLEUM CO., INC.,

Plaintiffs

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,

Defendants

This matter being opened to the Court by the Clerk of the United States District Court for the District of New Jersey, and it appearing that a judgment of the Court was entered on the docket on June 6th, 1958, with costs,

And it further appearing that said judgment was inadvertantly entered with costs,

It is, on this 11th day of June, 1958,

ORDERED that that portion of the judgment entered on June 6th, 1958, allowing costs be vacated and set aside.

(Signed) WILLIAM T. SMITH
Judge, U.S.D.C.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil 1134-57

SALVATORE TERRITO, CHARLES TERRITO, and VINCENT TERRITO, a partnership, trading as Territo & Sons and CALTER PETROLEUM CO., INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

To: U. S. Attorney
Peter J. Cammarano, Esq.

DEFENDANT'S COSTS

Docket Fee $20.00

Defendant's costs taxed in the sum of Twenty Dollars.

Dated: June 6, 1958

Newark, N. J.

Michael Keller, Jr.,
Clerk
By
(Signed) Minnie M. Spalletta
Deputy Clerk